

### REMARKS

Claims 7–17 are pending in the application. The status of the application is as follows:

<b>Claims</b>	<b>35 U.S.C. Sec.</b>	<b>References / Notes</b>
7, 8, 10, & 12–17	§103(a) Obviousness	<ul style="list-style-type: none"><li>• O'Rourke (U.S. Patent No. 6,078,728);</li><li>• Flashinski (U.S. Patent No. 6,154,607); and</li><li>• Kennedy (U.S. Patent No. 5,695,692).</li></ul>
9	§103(a) Obviousness	<ul style="list-style-type: none"><li>• O'Rourke (U.S. Patent No. 6,078,728);</li><li>• Flashinski (U.S. Patent No. 6,154,607);</li><li>• Kennedy (U.S. Patent No. 5,695,692);</li><li>• Schroeder (U.S. patent No. 4,725,712); and</li><li>• Shibahashi (U.S. Patent No. 5,558,700).</li></ul>
11	§103(a) Obviousness	<ul style="list-style-type: none"><li>• O'Rourke (U.S. Patent No. 6,078,728);</li><li>• Flashinski (U.S. Patent No. 6,154,607);</li><li>• Kennedy (U.S. Patent No. 5,695,692); and</li><li>• (Sprick (U.S. Patent No. 5,794,803); or</li><li>• Fuchs (U.S. Patent No. 5,078,803).</li></ul>

Applicants thank the Examiner for making this a non-final Office Action and for the discussion pertaining to claim 12. Applicants have presented arguments below for distinguishing the present invention from the art currently cited in this case.

**35 U.S.C. §103(a), CLAIMS 7, 8, 10 AND 12–17 OBVIOUSNESS OVER O’ROURKE IN  
VIEW OF FLASHINSKI AND KENNEDY**

*1. The combination of references fails to teach or suggest all of the elements required by claim 7.*

In the OA, on pp. 2-3, the Examiner indicated that O’Rourke discloses an evaporator having a base body with an integrated plug, a heating surface to provide heating to an active substance on a removable or slidable support, but without PTC heating resistance and a support with two housings adapted to two different types of containers of the active substances. Flashinski is cited to show that it is known in the art to provide an evaporator with a PTC heating element, and an active substance contained in a container that is a tablet and a tray having a volatile substance contained therein with a fragrance-permeable membrane. Kennedy is cited as disclosing support or cases with sections to accommodate varying sizes of active substances.

Independent claim 7 of the present application is not taught or suggested by the combination of references for the following reasons.

*2. Flashinski fails to teach or suggest two housings adapted in size and shape to two different types of containers, where the containers are a tablet and a tray.*

Regarding Flashinski, the Examiner stated, on p. 2:

Flashinski further shows the active substance contained in a container that is a tablet and a tray having a volatile substance contained therein with a fragrance permeable membrane. [emphasis added]

Claim 7 requires that the support comprises two housings that are respectively adapted in size and shape to two different types of containers of

active substances. In Flashinski, there is no disclosure of two housings to house both tablet and tray containers. Flashinski discloses a solid porous substrate 24 that contains a volatile (liquid) 26 contained within a cavity 22, formed in part by unlabeled ref. char. 32 in Figure 4.

Flashinski does state, at 5/16-22 that the impregnation of the solid substrate 24 can be replaced with a liquid or gel sans the substrate, but in no case does it disclose the presence of two housings adapted for two different types of containers that are a tablet and a tray. To the extent that the Examiner is reading the solid porous substrate 24 or even the impregnated 26 solid porous substrate on the “tray” of the present invention, then Flashinski fails to teach or suggest a tablet. To the extent that the Examiner is reading the solid porous substrate 24 or even the impregnated 26 solid porous substrate on the “tablet” of the present invention, then Flashinski fails to teach or suggest a “tray” (in this interpretation, if the Examiner is interpreting Flashinski’s element 32 as the “tray”, then there are not two different types of containers of active substances, as required by claim 7).

Furthermore, the Examiner indicated that Flashinski further shows the active substance contained in a container. The Applicants agree that Flashinski only shows a container, and therefore does not disclose the containers as being a tablet and a tray, which requires housings for two different types of containers.

In the Examiner’s previous Office Action Response to Arguments section, the Examiner noted that Flashinski is not applied to teach two housings, but rather the PTC heating element and the active substance that can be contained

in a container formed in a tablet and tray with a permeable membrane. In a prior amendment, the Applicants requested that the Examiner specifically point out which elements of Flashinski are being read on the containers formed in a tablet and tray with a permeable membrane—particularly because Applicants understand that any attempt to do so would result in an inconsistent application of the disclosed elements.

In the Response to Arguments section of the OA, on p. 5, the Examiner indicated how the elements of Flashinski are being applied against the language of claim 7. The Examiner stated:

But this structure is clearly illustrated in Figures 4–7 wherein Flashinski shows a slidable support (30B) with a container being a table [sic: tablet] (24) having an active substance in a tray (20) with a fragrance permeable membrane (28).

The disclosure of Flashinski in Figure 4, however, does not read on the claimed language. According to the Examiner's interpretation of these elements, Flashinski discloses only a single "tablet" and tray with a membrane, and thus only constitutes a single container. And the "tablet" (24) of Flashinski is not a "tablet" in even a conventional sense as one of ordinary skill in the art would understand it—rather it is a solid, but porous, substrate into which a volatile material is poured. Thus, Flashinski, using the Examiner's interpretation, comingles two elements that must be separate as required by the claim language. Furthermore, the tablet, as claimed, is a tablet of an active substance. The solid substrate 24 of Flashinski is not an active substance, but is a substrate for holding the active substance 26. Thus, the Examiner is not reading the elements of Flashinski onto the elements of claim 7 as one of ordinary skill in the

art would. Although the Examiner is permitted to give the broadest reasonable interpretation to claim terms, the Examiner is not permitted to ignore language used in the claims, and the solid substrate 24 of Flashinski clearly does not read on a tablet where the claimed tablet is one of an active substance.

*3. Kennedy fails to teach or suggest housing sections that can accommodate varying sizes of containers for the active substances in any one embodiment.*

In the OA, on p. 2, the examiner stated:

Kennedy shows that it is known in the art to provide a volatile carrying support or case with housing sections that can accommodate varying sizes of the active substances (see Figures 1, 6 and 7).

Applicants respectfully disagree with this characterization, because the housing sections that can accommodate different sizes of active substances are all disclosed as separate embodiments, and there is no embodiment shown in which the housings can accommodate two different types of containers. In the embodiment shown in Figure 1, the housing (cartridge 15) can hold multiple wedge-shaped blocks 32, but these blocks (containers) are all the same size and shape, and are not distinguishable in any manner such that one could be deemed a "tablet" and another a "tray". See Kennedy at 4/9-38.

Figure 6 shows a separate embodiment. Kennedy states, at 6/8-11:

Fig. 6 shows an alternative cartridge in which the holder 40 is formed without radial divisions and receives an annular block 41 of air freshening material. [emphasis added]

Again, Figure 7 shows another separate embodiment. Kennedy states, at 5/13-15:

In Fig. 7 there is shown a further form of cartridge in which holder 45 has a spoked arrangement in which four spokes 46 extend radially from the hub portion 27. [emphasis added]

While Kennedy does show multiple housings that support two different sizes and shapes of containers, it does not provide such a teaching in a single embodiment.

A disclosure of separate supports comprising separate housings does not teach or suggest the single support of the present invention that comprises two housings adapted in size and shape to two different types of containers of active substances, where the containers are a tablet and tray, nor is such a configuration obvious when looking to the teaching of Kennedy. In Kennedy, there are three separate sizes and shapes of containers disclosed: 1) the wedge shaped variant shown in Figure 1, 2) the annular block variant shown in Figure 6, and 3) the slotted disk shown in Figure 7. In each case, there is a single holder designed to accommodate only one of the containers (the "holder" in Figure 1 being the wedge-shaped holder). There is no teaching or suggestion that any two of the separately sized and shaped containers could be located within two housings of a support as required by the claims, nor would it make sense in Kennedy to provide separate holders adapted in size and shape to two different types of containers since each holder is specifically designed to accommodate only the container according to the specific embodiment described.

The language of claim 7 requires that a support comprises two housings. The only embodiment of Kennedy that could possibly read on a support comprising two housings is the embodiment shown in Figure 1, in which four

wedge shaped “ housings ” are contained within the holder 26 “ support ”. However, the wedge-shaped “ housings ” are not adapted in size and shape to two different types of containers, the types being a tablet and tray with semi permeable membrane.

In the a previous Response to Arguments section of the OA, on p. 5, the Examiner stated:

The application argues that the wedge shaped “ housing ” are not adapted in size and shape to two different types of containers. This argument is not deemed persuasive since each of the wedge housings in combination with each other can form and take on different housing shapes and form. In the applicant’s disclosed invention, the support member (8) allows a partial section of the support as another housing in relation to the larger housing section defined by the overall shape of the support member. Likewise, the support member (15) of Kennedy can be used to define one larger housing while one of the wedge section[s] of the support member serving as another housing.

The Examiner is mistaken, however, in inferring that simply because a prior art reference teaches that one container (15, the larger housing section defined by the overall shape) can hold another container (the wedge-shaped sections), it necessarily teaches any and all container-within-a-container configuration. According to the Examiner’s interpretation, two separate wedge shaped pieces of the active substance could be construed as “ a container ”, and therefore, two adjacent wedges would constitute “ a container ” of a first type, whereas two oppositely placed wedges would constitute “ a container ” of a different type. Although the Examiner is permitted to give the broadest reasonable interpretation to the claim terms, this interpretation must also be

consistent with the interpretation that those skilled in the art would reach. See MPEP §2111 (introductory section), citing *In re Cortright*, 165 F.3d 1353, 1359 (Fed. Cir. 1999). Applicants respectfully assert that one of ordinary skill in the art would not construe two separate pieces arranged in two separate adjacent wedge-shaped containers as being a container of one type, and two separate pieces arranged in two separate opposite wedge-shaped containers as being a container of a different type.

Furthermore, the Examiner infers that since it is *conceivable* that one *could* create different arrangements or configurations for the wedges in the housing shapes disclosed by Kennedy, it is therefore obvious to do so—this reflects hindsight reasoning that is strictly prohibited in the analyses for obviousness and is the primary reason that a requirement for a teaching or suggestion for doing so be found in the prior art.

In the present Response to Arguments section, on p. 5, the Examiner states:

As seen and illustrated in the drawing Figures of Kennedy, there can be two different type [sic] in size and shape of the active substances where a triangle wedge shaped activate [sic] substance or a circular shaped active substance can be provided in a carrier support which has compartments that can accommodate such size and shape. Furthermore, Figure 8 of Kennedy which is shown to carry a circular shaped active substance has the triangle compartment that is capable of carrying and supporting the triangle wedge shaped active substance as shown in Figure 1. The support structures of Kennedy which has the compartments shown to accommodating [sic] varying size and shapes of active substance clearly meets the recited support having two housings.



There is no teaching or suggestion that a single wedge-shape piece 32 used in Figure 1 in Kennedy to go into a matching wedge-shaped container 34, could be used in the partial wedge-shaped region 54 of the container shown in Figure 8. Flashinski teaches, in Figure 7, and appertaining text, a holder 45 for the disk having spaced segments 48. Spokes 46 of the holder are embedded into the disk. It would make no sense to have the spoked arrangement of the holder 45 with a spoke or spokes embedded into a single wedge as shown in Figure 1, and the Examiner's speculation that the wedge of Figure 1 could be used in the partial wedge-shaped region 54 can be viewed as nothing more than hindsight. Furthermore, the partial wedge shaped region 54 would not effectively house the triangle shaped wedges shown in Figure 1, since the pointed end region would extend beyond the partial walls of the container in Figure 8.

In summary, although Kennedy shows the possibility of using different types of active substance containers, and respective housings to accommodate these containers, these are all disclosed as separate embodiments, and in no case is a slidable support disclosed comprising two housings that are respectively adapted in size and shape to two different types of containers of the active substances.

As indicated in MPEP 2143.01(III), the fact that references can be combined or modified is not sufficient to establish *prima facie* obviousness, unless the prior art also suggests the desirability of the combination. The Examiner has failed to provide a showing of how the prior art would suggest the desirability of the combination or provide motivation for making the combination.

However, in this case, even when O'Rourke, Flashinski, and Kennedy are combined, there is still a lack of teaching for the elements of independent claim 7.

MPEP 2143.03 indicates that in order to establish a *prima facie* case of obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. In the present case, none of the references, alone or combined, teaches the support comprising two housings adapted in size and shape to two different types of containers of active substances.

Therefore, Applicants assert that amended claim 7 is new and inventive over the prior art, and respectfully request that the Examiner withdraw this §103(a) rejection from the present application.

*4. Claims 8, 10 and 13–17 can be distinguished from O'Rourke, in view of Flashinski and Kennedy based on their dependence from independent claim 7 and as argued above.*

Applicants respectfully assert that the combination of references do not teach or suggest the present invention. As previously discussed, O'Rourke, in view of Flashinski and Kennedy, fails to show the device claimed in claim 7, which forms the basis for claims 8, 10 and 13–17. As the combination of references fails to suggest the evaporator device claimed in claim 7, they also fail to suggest the indirect claims adding different features to the evaporator device of claim 7.

*5. O'Rourke does not teach or suggest a U-shaped body, as required by claim 8 of the present application.*

In the OA, on p. 2 of the OA, the Examiner indicated that O'Rourke discloses that the base body has a U shape with a rear and a front portion which further has aeration grills with the support fit between the rear and front portions.

Applicants respectfully assert that O'Rourke does not disclose a U-shaped body (18), but rather a pass-through path (18) (6/32-33). If the pass-through path 18 of O'Rourke was a U-shaped body, it would not allow a tray to "pass-through" it, but would rather stop when it made contact with the base of the "U". Therefore, the design of O'Rourke is cannot read on the U-shaped body element of claim 8.

Furthermore, one of ordinary skill in the art would understand "U-shaped" to mean a generally curved bottom portion, straight side portions, and a straight top portion. O'Rourke does not disclose a shape having these features. At best, the shape disclosed by O'Rourke would be a generally truncated triangular shape having stepped regions. One of ordinary skill in the art would not understand the complex truncated triangular shape disclosed by O'Rourke as being "U-shaped".

Furthermore, claim 8 requires that the support establishes a surface continuity with the base body and the housings. The support (volatile carrier 10) of O'Rourke does anything but establish a surface continuity with the base body. It protrudes awkwardly at a right angle to the base body and always juts out of at least one side and sometimes both sides of the base body. One of ordinary skill in the art would certainly not understand the support of O'Rourke as establishing a surface continuity with the base body.

For these reasons, the Applicants respectfully assert that the amended claim language and the above arguments clearly distinguish over the prior art, and respectfully requests that the Examiner withdraw this §103(a) rejection from the present application.

**35 U.S.C. §103(a), CLAIM 9 OBVIOUSNESS OVER O'ROURKE IN VIEW OF FLASHINSKI AND KENNEDY AS APPLIED TO CLAIMS 7, 8 10 AND 13–17, AND FURTHER IN VIEW OF SCHROEDER AND SHIBAHASHI.**

*6. Claims 8, 10 and 13–17 can be distinguished from O'Rourke, in view of Flashinski and Kennedy and in further view of Schroeder and Shibahashi.*

In the OA, on pp. 3 – 4, the Examiner indicates that claim 9 is obvious over the combination of O'Rourke in view of Flashinski and Kennedy as applied to claims 7, 8, 10 and 13–17 above, and further in view of Schroeder and Shibahashi in that O'Rourke, in view of Flashinski and Kennedy, is through to show the device claimed except the thermochrome paint on the body. The Examiner indicates that Schroeder shows a fluorescent screen provided on the body of the evaporator device to indicate the function of the device and Shibahashi shows that it is well known in the art that thermochromic materials provide fluorescent colors which can be used to indicate operating temperature.

Applicants respectfully assert that the combination of references do not teach or suggest the present invention. As previously discussed, O'Rourke, in view of Flashinski and Kennedy, fails to show the device claimed in claim 7, which forms the basis for claim 11. Thus, while Schroeder and Shibahashi may disclose the use of thermochromic materials to indicate operating temperature of the device upon which the thermochrome paint is located, they do not suggest a

support comprising two housings respectively adapted in size and shape to two different types of containers of active substances, the containers being a tablet and tray with semi permeable membrane.

For these reasons, the Applicants respectfully assert that the amended claim language and the above arguments clearly distinguish over the prior art, and respectfully requests that the Examiner withdraw the §103(a) rejection from the present application.

**35 U.S.C. §103(a), CLAIM 11 OBVIOUSNESS OVER O'ROURKE IN VIEW OF FLASHINSKI AND KENNEDY AS APPLIED TO CLAIMS 7, 8 10 AND 13–17, AND FURTHER IN VIEW OF SPRICK OR FUCHS.**

*7. Claim 11 can be distinguished from O'Rourke, in view of Flashinski and Kennedy and in further view of Sprick or Fuchs.*

In the OA, on p. 4, the Examiner indicated that claim 11 is obvious over the combination of O'Rourke in view of Flashinski and Kennedy as applied to claims 7, 8, 10 and 13–17 above, and further in view of Sprick or Fuchs in that it would have been obvious to one of ordinary skill in the art to adapt O'Rourke, as modified by Flashinski and Kennedy, with the safety mechanism disclosed in either Sprick or Fuchs.

Spricks and Fuchs disclose child resistant containers, where there is a threaded closure and a means of locking one piece of the container to another. In both patents, the means of locking one piece to another can be overcome by deflecting or flexing a container wall to disengage the locking mechanism, allowing the parts of the container to be unscrewed using the threaded closure.

Applicants respectfully assert that the combination of references do not teach or suggest the present invention. As previously discussed, O'Rourke, in view of Flashinski and Kennedy, fails to show the device claimed in claim 7, which forms the basis for claim 11. Thus, while Sprick and Fuchs may disclose safety mechanisms that can be released upon distortion of the device, they do not suggest a support comprising two housings respectively adapted in size and shape to two different types of containers of active substances, the containers being a tablet and tray with semi permeable membrane.

For these reasons, the Applicants respectfully assert that the amended claim language and the above arguments clearly distinguish over the prior art, and respectfully requests that the Examiner withdraw this §103(a) rejection from the present application.

### **CONCLUSION**

Inasmuch as each of the rejections have been overcome by the amendments and arguments presented, and all of the examiner's suggestions and requirements have been satisfied, it is respectfully requested that the present application be reconsidered, the rejections be withdrawn and that this application be passed to issue.

**DEPOSIT ACCOUNT STATEMENT**

The Commissioner is authorized to charge any fee shortages and credit any overpayments to deposit account no. 50-1519.

Respectfully submitted,

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